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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1036

In the Matter of the Application of
EDWARD LECCI, individually and as President of the Nassau County Patrolmen's Benevolent Association,

Petitioners,

— against —

ADELE LEONARD, executive directrix of the Civil Service Commission, and the Civil Service Commission and FRANCIS B. LOONEY, Commissioner of Police and the Nassau County Police Department.

Respondents

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the State of New York.

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TABLE OF CONTENTS

	Page
Argument in Opposition to Granting a Writ of Certiorari	1
POINT I — The Regulations Enacted by the Respondents are constitutional in their entirety	1
POINT II — Respondents' requirements for admission to policemen's promotional examinations are fair and do not warrant Review by this Court	8

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Argument in Opposition to Granting a Writ of Certiorari.

POINT I

The regulations enacted by the respondents are constitutional in their entirety.

In its efforts to provide better police services to the community which it serves, the Nassau County Police Department has made available to all its members a tuition-free two-year college program leading to an associate degree in police science. The enactment of Nassau County Civil Service Resolutions 41 and 435, and Nassau County Police Department Order No. 371, establishing a prere-

quisite of two years of college for promotional examinations, was essential for the improved operation of a modern police department.

It is desirable that all law-enforcers attain at least two years of college education so that they can better cope with the increase in crime and social disorder. An officer is called upon to deal with a variety of social problems, in addition to the criminal element. In an affluent community such as Nassau County, a better educated patrolman will find it easier to command and merit the respect of the citizenry.

Thus, the enactment of the above-mentioned resolutions and order (which pertain only to candidates for promotion to the rank of Captain, Lieutenant and Sergeant) was necessitated by the awesome job of preventing and solving crimes perpetrated by a more technologically advanced criminal; quieting disturbances stemming from complex social problems and often instigated by the well-educated disenchanted; and administering and supervising an agency which has at its command thousands of men, in addition to equipment which was a figment of science fiction several decades ago.

In view of these facts the petitioner did not contest the authority and appropriateness of the Civil Service Commission's resolutions and the Commissioner's order which set a two-year college education as a prerequisite for promotions for new members just joining the police force (R. 8). Indeed, on page 5 of his brief to the Lower Court, he stated:

> "Petitioner fully agrees said educational requirements should apply to members of the Police Department who joined the Department after said requirements were enacted."

However, petitioner argues that current members of the force enlisted with the understanding that there were no college educational requirements for promotion (R. 8). Petitioner contends that to impose this requirement on current members of the department would cause an "undue hardship" on these family men (R. 8).

Thus, petitioner's description of the two-year college educational requirement as arbitrary, capricious, illegal and unconstitutional stems not from the inadvisability of such a prerequisite; not from the lack of authority of respondents to determine that such a prerequisite is essential for the operation of the department and the control of crime; and not from any discriminatory practice.

In addition petitioner cannot complain of any financial burden being imposed since the Police Department has had a tuition-free program in effect for more than three years. This coupled with the flexible schedule offered at Nassau Community College, it is reasonable to assume that this degree was at least as easily accessible to all policemen as to any individual who is holding down a job to support a family and attending college for a degree.

Finally, the petitioner cannot claim surprise since three years—in the case of candidates for the positions of Sergeant and Lieutenant, and two years—in the case of candidates for Captain, will elapse before said regulations will go into effect. In the interim, all candidates will be admitted to promotional examinations with or without the college requirements.

Petitioner's only support for his contention is that it will cause an undue hardship on members who enlisted with the understanding that no college educational requirements were necessary.

Petitioner cites two cases in support of this contention.

The first cited is *Application of Bailey, et al.*, 178 Misc. 1045, 37 N.Y.S. 2d 275 (Sup. Ct. N.Y.Co. 1942), *rev'd on*

other grounds, 265 App. Div. 758, 40 N.Y.S. 2d 746 (1st Dept. 1943), *aff'd*, 291 N.Y. 534, wherein the interpretation and legality of section 61-a of the General Corporation Law was in issue. In that case, the directors of Bush Terminal Company, after successfully defending an action brought against them by a trustee of that corporation to hold them personally liable for having paid dividends out of capital, in violation of the Stock Corporation Law, brought a proceeding to recover expenses incurred in their successful defense. One of the arguments before that court was whether the statute was applicable in that it took effect after the entry of the judgment of the lower court but during the pendency of the appeals therefrom. The court therein, clearly faced with a question of retroactivity, first stated that except for ex post facto laws (referring only to penal laws) and laws impairing the obligations of contracts, neither of which were involved, neither the Federal nor State Constitutions contained any prohibition against retroactive laws as such. The court recognized, however, that retroactive laws may be invalid under the due process clauses, stating:

> "Laws which attempt retroactively to create a liability in relation to a transaction as to which no liability previously had attached generally are so arbitrary, harsh, and oppressive that it is perhaps accurate to say of them that they are presumptively invalid (See *Graham & Foster* v. *Goodell*, 282 U.S. 409, 426), but too numerous and varied are the instances in which such laws have been sustained to permit the broad generalization that such laws necessarily are unconditional...
>
> "...The true approach, the one I take to be the one now adopted in authoritative cases, seems to me to be to refuse to judge retroactivity in the abstract or *per se* and appraise the operation and effect of

> the statute with a view to all its elements, including but not viewing alone its retroactivity, and determine from the entire setting whether its operation and effect in that particular setting are so harsh, arbitrary, and oppressive as to constitute a denial of due process of law (or of the equal protection of the laws); and that seems to me but another way of repeating that the test of constitutionality is not an absence of retroactivity but an absence of a denial of due process or of equal protection." 178 Misc. at 1049-1050, 37 N.Y.S. 2d at 280-281.

The second case cited by petitioner is *Hayman* v. *Morris, n.o.r.*, 37 N.Y.S. 2d 884 (Sup. Ct. N.Y. Co. 1942). This case also dealt with the allowance of expenses pursuant to section 61-a of the General Corporation Law. In addressing itself to the question of retroactive legislation, the court said:

> "If the effect of the retroactive legislation is to create undue harship, or is unjust, or oppressive, it is invalid; otherwise it is not. A retroactive law is not necessarily void; 'A retrospective law may be just and reasonable' (Inhabitants of Town of Goshen v. Inhabitants of Town of Stonington, 4 Conn. 209, 225, 10 Am. Dec. 121; see, also, United States v. Schooner Peggy, 1 Cranch 103, 109, 2 L.Ed. 49); 'they are often beneficial, and sometimes necessary' (Blount v. Windley, infra, 95 U.S. at page 180, 24 L.Ed. 424); considerations of public good and public justice have been treated and held as adequate reasons for upholding retroactive legislation. Blount v. Windley, 95 U.S. 173, 180, 24 L.Ed. 424; Brearley School, Ltd., v. Ward, 201 N.Y. 358, 363, 94 N.E. 1001, 40 L.R.A.,N.S., 1215, Ann. Cas. 1912B, 251; Goshen and Peggy cases, supra."

The key relationship of the cases petitioner cites with the case before this Court is that of retroactivity. The law involved in the *Bailey* and *Hyman* cases *supra* included a clause which provided:

> "This act shall take effect immediately and shall apply to all such actions, suits or proceedings as may be pending and in which no final judgment has been made and entered at the time this act takes effect." L.1941, ch. 350.

It was this clause which eventually led to an adverse decision for the directors in the *Bailey* case by the Court of Appeals. Though the retroactive effect of the law was upheld in both cases, the issue of what constituted a "final judgment" led the Court of Appeals to deny reimbursement in the *Bailey* case since a lower court had already rendered a decision prior to the law's enactment. However, notwithstanding the ratification of legality of a retroactive clause in section 61-a of the General Corporation Law, both cases did formulate conditions of valid retroactivity.

The applicability of these formulations is dependent on whether the resolutions involved herein, namely Resolutions 41 and 435, are retroactive. A statute is not "retroactive" merely because it draws upon antecedent facts for its operation. At the very least the statute must interfere with the antecedent *rights* of the parties.

Since "retrospective" is sometimes treated as being legally synonymous with "retroactive" (*Conde* v. *City of Schenectady*, 164 N.Y. 258, 58 N.E. 130, 132 [1900]; 77 C.J.S. *Retroactive*, p. 331), and since there does not appear to be a legal distinction between the two terms (*City of New York* v. *Foster*, 148 App. Div. 258, 261, 133 N.Y. Supp. 152, 155 [3d Dept. 1911]; *Annacchino* v. *Annacchino*, 61 Misc. 2d 636, 306 N.Y.S. 2d 603 [Sup. Ct. Onondaga

Co. 1969], the Court is respectfully directed to refer to another case, *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall 105, 22 Fed. Cas. 756, 757, Fed. Cas. No. 13,156 (Cir. Ct. D. New Hampshire 1814), wherein Justice Story, in answering the question as to what is a retrospective law, stated:

> "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

The petitioner's claim that these regulations are being applied retroactively to those persons who were members of the police force at the time the regulations were enacted, and thus violate the Constitution.

Even assuming that these resolutions are retroactive, they would still qualify as a reasonable imposition of a new obligation. As was stated in *Application of Bailey, supra*, the legality of retroactivity should not be judged in the abstract. Mere retroactivity is not sufficient. It must be determined from the entire setting whether the operation and effect of the retroactive obligation is so harsh, arbitrary and oppressive as to constitute a denial of due process of law.

Retrospective laws in and of themselves may be desirable. As was stated in *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 391, 1 L. Ed. 648, 650 (1798):

> "...but there are cases in which [retrospective] laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement...But such laws may be proper or necessary, as the case may be."

The petitioners, the respondents, and the Court below recognize the necessity for supervisory personnel of a police force to have a minimum of two years college education in order to be better prepared to prevent and solve crime perpetrated by the more technologically advanced criminals of today. The petitioners claim a proprietary right to advance in the Police Department (p. 4 petition for certiorari). The Respondents do not propose to deny any member of the force any such advancement, but merely to condition the promotions on the successful completion of a two year college course in police science, a condition which all parties agree is proper and essential. One is hard pressed to find any right to job advancement in the Constitution, and this becomes even more difficult when the individuals seeking the advancement lack the education which is deemed essential to the proper fulfillment of the obligations which that advanced position entails. Yet this is precisely the position of the petitioners.

POINT II

Respondents' requirements for admission to policemen's promotional examinations are fair and do not warrant review by this Court.

It is axiomatic that the determination of a Civil Service Commission setting minimum requirements for admission to any examination will not be interfered with by the courts, if any fair argument can be made to sustain these requirements.

In *Matter of Weinberger* v. *Watson*, 306 N.Y. 307, 313, 114 N.E. 2d 15 (1953), the court upheld a change in the eligibility requirement for a promotional examination and, in so doing, determined that prior eligibility under different standards to take the examination did not bind the Commission. In its decision, the court stated:

> "The decisional law on the problem is that the commission's fixing of the minimum requirements for admission to an examination is not to be interfered with by the courts if any fair argument can be made to sustain its action, * * * even though they may differ from the commission as to its advisability." *People ex rel. Moriarty v. Creedman*, 296 N.Y. 570, 575-576; *People ex rel. Schau v. McWilliams*, 185 N.Y. 92, 99; *Matter of Lavertu v. Finegan*, 249 App. Div. 411, affd. 275 N.Y. 553; *Matter of Davis v. Wiegers*, 260 App. Div. 127, affd. 285 N.Y. 537; and see *Matter of Murray v. McNamara*, 303 N.Y. 140, 144.)" 20 N.Y. at 513.

In the instant case, in the decision of the lower court (Veber, J.), it was stated:

> "The petitioner has offered no argument whatsoever to contradict the recommendation of the Commissioner of the Nassau County Police Department that supervisory personnel be better educated to cope with the many problems facing law enforcement officers today." (R.21)

In *Colasurdo v. Staulon*, 28 A.D.2d 959, 282 N.Y.S. 2d 974 (2d Dept. 1967), the Appellate Division affirmed, without opinion, a judgment of the Supreme Court, Rockland County, dated December 22, 1966. In this case, Mr. Justice Frank S. McCullough, in an opinion dated June 15, 1966, dismissed the original complaint, stating:

> "No authority has been submitted to the Court, nor does the Court know of any authority for the proposition that once a person is declared eligible to take an examination for a Civil Service position, he must always thereafter be deemed eligible to take subsequent examinations for the same position." (Resp. Lower Court Brief, p. 17)

This same principle was adhered to in *Matter of Moss v. Dept. of Civil Service*, 55 Misc.2d 653, 286 N.Y.S.2d 386 (Sup. Ct. N.Y. Co. 1967), wherein the application of the petitioner (a senior youth parole worker) to take the Youth Parole Supervisor promotional examination was denied for failure to possess the necessary educational prerequisite (a master's degree). Petitioner argued that he had the right to participate in the promotional examination on the basis of the prerequisites in effect when he entered the permanent employ of the respondent, Department of Social Welfare. In denying the petitioner's application, the court stated:

> "The claim and contention of petitioner that he had the right to participate in the promotion examination on the basis of the minimum educational prerequisites in effect when he entered into permanent employ in 1960 cannot be sustained. ..." 55 Misc. 2d at 656, 286 N.Y.S.2d at 389.

In *Matter of Crowley v. Milone*, 55 Misc.2d 660, 286 N.Y.S.2d 143 (Sup. Ct. Nassau Co. 1967), *aff'd*, 31 A.D.2d 928, 299 N.Y.S.2d 804 (2d Dept. 1969), the petitioners, probation officers with permanent status, argued the eligibility requirements for a promotional examination could not be reduced, permitting persons with less experience and training to take the examination. The lower court upheld the change in eligibility requirements, stating that "... the petitioners have not shown that there is no reasonable basis for the change." 55 Misc.2d at 662, 286 N.Y.S.2d at 146. This decision was upheld by the Appellate Division, Second Department, with all judges concurring.

The above cases are adequate precedent for the enactment and application of Resolutions 41 and 435. The Civil Service Commission possesses broad powers and discretion in determining eligibility to participate in promotional examinations. See also, *Matter of Giorgio v. Lang*, 37 Misc.

2d 1006, 235 N.Y.S.2d 137 (Sup. Ct. N.Y. Co. 1962), *aff'd no opinion*, 18 A.D.2d 968, 238 N.Y.S.2d 506 (1st Dept. 1963). Where this discretion is exercised and additional prerequisite education requirements are adopted, it becomes the obligation of the petitioner to show that there was no reasonable basis for the change. The appellant herein has admitted that the new requirement was advisable.

The respondents respectfully submit that the additional requisites adopted by the resolutions in question were clearly not illegal, discriminatory, arbitrary or capricious nor violative of any Constitutional provision.

CONCLUSION

For the reasons stated above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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